No. 1521.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COLUSA PARROT MINING AND SMELTING COMPANY, (A Corporation),

Plaintiff in Error,

v.

THOMAS MONAHAN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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McKEE PRINTING CO., BUTTE

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SUPPLEMENT TO THE STATEMENT OF THE CASE BY THE PLAINTIFF IN ERROR.

In this brief for the sake of brevity and clearness we shall call the Plaintiff in Error, that is the Colusa Parrot Mining and Smelting Company, the Master, and we shall call the Defendant in Error, Monahan.

We are not satisfied with the statement of the case made by the master in its brief. This statement is very insidious, and unless compared carefully with the record by the Court, the Court will be deceived by this statement.

It will be noted throughout this statement of the master, and throughout the entire brief of the master, that there is not a single reference to the record before the argument is commenced on page 42. In this supplemental statement we shall call attention to some failures on the part of the master to state the whole truth about the record in its statement of the case, and first on page 4 in the master's statement we find a glaring failure to state the whole truth.

We are told that in a prior suit there was a dismissal, and that said dismissal operated as a retraxit, and was a voluntary recognition on the part of Monahan of his right to no further prosecute, etc.

We are told further in this statement of the master that there was no denial of this plea of retraxit, save the affirmative allegation of no power in an attorney to enter into retraxit. This plea of a retraxit is denied by virtually a general denial in the reply. It is admitted, of course, that there was a former suit and it was dismissed by agreement of counsel, each party paying its and his own costs, but how absurd does all of the statement about the retraxit appear (a word that has not been heard for half a century, and the meaning of which is almost unknown to the legal profession), when we look to the record of this supposed retraxit and find

that the first action was dismissed *without prejudice*, and without costs to either party.

On page 7 of the master's statement it is claimed that all of the electricians who were introduced as expert witnesses testified that this form of insulation, i. e. rubber tape with an additional covering of stick tape, was best for practical insulation in commercial use, and that this insulation was the best and most perfect that was possible to be made, and other language to the same effect. The record demonstrates that this part of the statement is contrary to the testimony, R. 53:

"Well, taking the wire that was there, it is known as triple plate weather-proof wire, and it is not considered safe, no sir."

R-56: "The best insulated wire that was known at that time, and in fact at the present time, is rubber covered wire."

"Rubber-covered wire had been in use in Butte fully fifteen years."

R-65: "I believe that we insulated the wire at that point, (the point of contact), equally as strong as the other insulation on the wire. The insulation of the wire adjoining that was triple plate, weather-proof wire —I would not want to come in contact with the wire standing on a roof, carrying that pressure—I mean that the wire at that point, I believe, was insulated so that it was as safe as any wire adjoining it, but weather-proof wire is not considered safe for people to come in contact with, carrying high potential currents. I feel positive that that insulation of that wire was made so

that it was as safe as any wire adjoining it, but I am also positive that the wire adjoining was not safe. None of that wire was in a safe condition."

And again from the testimony of another witness, R-109, L-21:

"The insulation at the rag string was weather-proof. Well, rubber-covered insulation is supposed to be the best; the best they can get."

And again from this witness Aiken, R-110:

Q. "What have you to say as to the safety of a human being coming into contact with this wire even if the insulation was in perfect condition, with the current which that wire was carrying, and standing on that corrugated roof?" A. "Well I would not like to take the chances, myself, even if it was rubber-covered. I would not consider it safe if it was rubber-covered." Q. "And supposing it was not rubber-covered, but covered with the insulation which it had on it, and suppose that the insulation were new and in good condition?" A. "Well I would not consider that safe either."

It is also claimed at the bottom of page 7 in the master's statement that *it developed* that the master's boss had warned the men under his command to be careful, and on page 8 that he knew that electric wires were dangerous, and that these wires carried electricity.

Counsel for the master when they use language of this kind, and speak of its having developed, forget the fact that the jury by their verdict have found that it

did not so develop. Counsel would have the Court believe that a statement made by a discredited witness is entitled to the same weight before the Appellate Court as if it were a fact admitted by the pleadings. No matter how many of the witnesses contradicted these statements which are set forth in the master's brief, and no matter that the jury disbelieved the master's witnesses wherever they are contradicted, and no matter that the lower court on the motion for a new trial denied that it *so developed* at the trial, yet counsel make these assertions that things developed which were absolutely disputed by witnesses which the jury and the Court believed. The warning which they talk about, and which they claim the boss gave Monahan, is denied in the testimony of John Hoffman, who was with Monahan when he was sent up on the roof.

R-180: "Kessel (the boss) did not say anything about the wires, he said simply go up and fasten that timber. He said nothing, however, about any electric current, or anything of that nature," and

Monahan on R-177, says:

"I have said that I knew electricity was dangerous. I did not know before I was hurt that this particular wire at the rag string carried any dangerous current of electricity. I knew that electricity was in them, but I thought they were safe;"

and the boss, himself, did not testify that he told Monahan to be careful at the time, or at any reasonable time before the time of his injury. His language is characteristic:

R-258: Q. (The boss)—"What, if anything, did you say to him (Monahan) at the time that he went up there with regard to any dangers that there might be?" A. "Well sir, I could not say that I did say anything to him on that day." Q. "On that particular day?" A. "At that particular time; but I know that we are always making it a matter of custom to tell the boys to be careful. It don't make any difference whether we are working around electric wires, or whether we go ————."

Again on page 8 in the statement of the master it is claimed that witnesses were allowed to testify as to the condition of the wire two years after the injury, and after a fire had changed the condition of the wire, and counsel again used that word it "developed" in the trial that their examination of the premises related to a time after the fire. Of course if it had developed that their testimony related to a time after the fire, it would have been counsel's duty to move to strike out their testimony when it did so develop, and this counsel never did, but it developed that three of the witnesses for the plaintiffs were mixed up on their dates. That they were referring to the date of their examination to a short time before the trial of Monahan against a former defendant, the Missouri River Power Company. That they had examined the wire before that first cause was to be tried. The cause was actually tried in April, 1906, but it had been set for trial as early as January, 1906. The fire took place January 31st, 1906, and the witnesses had examined the place in prepara-

tion for the trial which was to have taken place in January, but did not take place until April, and this was all explained to the jury in the testimony of Monahan, himself, and it was shown by such testimony that the dates at which Monahan took all of the expert witnesses to the place, was about the first day of December, 1905.

R-138: "I could not give the date now when Mr. Aiken who testified yesterday, and Mr. Elliott and Mr. Keefe and myself visited the point of the rag string on the model with Mr. Maury. I think it was—I am certain it was either the latter end of November or the first of December, of the year 1905. My case against the Missouri River Power Company was set for trial at that time, and not tried at that time until the following April."

Now it did develop time and time again throughout the testimony that the wires were in the same condition (except for inherent deterioration by the elements) on the dates when Monahan took his expert witnesses to view the place as they had been on the date that the witness, Elliott, helped to make the joint near which, or on which, Monahan was hurt.

R-111. Testimony of Aiken;

R-69 Testimony of Elliott;

R-247. Testimony of Bartzen, a witness for the master.

Again on page 10 of the master's statement we are told that the insulation at the joint was rubber-covered with stick tape, and was of the most improved and per-

fect character known to electricians, and that the point of contact by Monahan with the wire was on this rubber-covered stick tape and not on the weather-proof insulation adjacent to it. Now the model itself shows that the rubber-covered stick tape was not as wide as the burn on Monahan's hand. That his hand must of necessity have gone over the stick tape at the joint and been injured by the electricity coming out at the points through the weather proof. Monahan's hand cannot be produced as an exhibit, it is true. That is not the fault of Monahan, but merely demonstrates the impossibility of an appellate tribunal ever being able to see the revelancy and competency of the testimony as well as the lower court, and the inability of the appellate tribunal ever being able to pass on the weight and effect of the testimony as well as the trial jury. Counsel in their statement for the master have carefully omitted all reference to the overwhelming testimony appearing in record as to the negligence of the master. In the entire case whenever any witness of Monahan or any witness for the master was asked if those wires could have just as well been hanged 8 or 9 feet above the roof instead of 4½ or 5, they answered with unanimity that it was just as practicable, and that the expense of so doing would have been nominal. We shall merely cite the Court to the record as to witnesses for the defense. Testimony of Aiken; (and by the way one Aiken, A. D. Aiken, was a witness for the servant, George K. Aiken was a witness for the master).

R-270: "Three electricians ought to lift those three

wires if the scale of this is one inch to one foot, six feet higher than they were in two days; they ought to do it in two days. There would have been no more danger of their falling down or being affected by storms than they would be here as they are."

Further, R-271, same witness:

"We try, if possible, to keep wires where people go that are less than seven and a half feet above the building, out of the way. The city ordinance is seven feet above the roof."

Whether the wire was insulated with rubber or any other kind of insulation it was negligence to hang it low, because carrying that voltage of 2500 no human prudence and appliance could make it absolutely safe.

R-277. Testimony of Miller, a witness for the master:

R-278. Testimony of Miller, a witness for the master:

The current carried was greater than that administered in New York and Ohio to electrocute culprits.

As to the injuries the testimony shows that Monahan, a laboringman, was laid up from burns and attended by physicians for four month. R-198: That his little finger of the left hand was dead. That there were permanent scorches and wounds on his foot. R-198: That the natural tissue on a portion of his left hand was gone, replaced by scar tissue, which could never be replaced by natural tissue. That at the time of the trial almost three years after the injury, the wounds on Monahan's foot might have nervous involvements

underneath the skin, and that his feet if they still gave him pain, would never be well. R-200: Monahan testified that his feet were still sore from the wounds in cold weather, and that he suffered indescribable pain at the time of the injury.

The theory of Monahan's case was that it was negligence of the master to hang the wire 4½ feet above the roof. Under and circumstances no matter what the insulation was that was put upon the wire, but that the condition might have ben improved somewhat with the wire hanging low if the best-known rubber insulation has been used around the wire. There was another right to recover, or negligent conduct we may call it of the master, and that is in the failure to inspect the wires. It appeared in the testimony of Bartzen, a witness for the master, that the wires had never been inspected by anybody from the time they were put up, 7 or 8 years before the accident, until the day of the accident, R-243.

ARGUMENT AND AUTHORITIES.

Counsel for Monahan desire, with the permission of the Court, to answer the argument of the master in the order of the argument set forth in its brief in this behalf filed.

I.

The first question called to the attention of the Court is an alleged insufficiency of the complaint.

It is alleged that the use of the word "inadvertently" in paragraph IX of the complaint is an admission by plaintiff that he was negligent, and, seasonable objection being made thereto, it is attempted to deduce that plaintiff has therefore no cause of action.

The point made is very fine and, from the use of the word in the paragraph and in the complaint, we confidently assert there is no authority to sustain the contention. We quote the first portion of paragraph IX, to give the word its proper setting:

"That on or about the said 12th day of July, A. D. 1904, the said plaintiff was sent upon the said roof of the said ore house at the command of his master, as aforesaid, and without any negligence on his part, and in the exercise of all care on his part, and being ignorant of the danger of touching the said wire, inadvertently, with his left hand and while engaged in the business of his master, took hold of the said wire so insufficiently and negligently insulated by the defendant as aforesaid, and charged by the said defendant with electricity, as aforesaid; that immediately the said current

of electricity passed through the body of this plaintiff into the said roof, the same being of iron as aforesaid, and which said roof was a good conductor of electricity, and the plaintiff was thereby grievously burned and injured thereby, etc."

It may be negligence per se purposely to take hold of an electric wire, for the maxim, violenti non fit injuria, would appear to be applicable. The word "advertently" may be akin to the word "purposely," but the word "inadvertently" is certainly not. The case of Lexington R. Co. v. Fair's Admr. cited, is clearly not an authority for the master. The court say in the Fair case while commenting on a North Carolina case:

"The boy Fair was, when killed, travelling on a sidewalk, where he had a right to be. The deadly wire was in easy reach. He, boy-like, inadvertently or purposely, touched, or took hold of it, without knowing of the danger of so doing, as there was nothing in its appearance to give him warning of the presence of the mysterious and deadly current with which it was charged. Under such circumstances it may be doubted where there was any proof of contributory negligence to go to the jury, etc."

The Fair case is also authority for the well-settled rule applicable to the case at bar:

"It is the duty of an electric company to know the condition of its wires, and to use the *utmost care* to keep them safely protected by proper insulation, so that those exposed to the liklihood of contact with them may escape injury."

See, also:

Bourke v. Butte Elec. & Pow. Co., 33 Mont. 267;

Griffin v. United Elect. Light Co. (Mass.), 32 L. R. A. 400.

The evidence is: That electrical work was something plaintiff (an ordinary laborer) knew nothing about; had never worked thereat prior to the date of the injury complained of, and knew nothing about the danger of touching the (deadly) wire before he touched it. (Record, page 130). Now, may a master order a common laborer ignorant of the perils of electricity, to go upon the steep iron roof of a building to adjust certain timbers near a deadly electric wire, and then escape liability in the event the servant should inadvertently touch the wire to his great bodily harm? We think not, and urge, in the light of the authorities, that the master is guilty of culpable negligence in such case. In a similar case (the person injured, however, being an experienced lineman, and technically a trespasser and warned of the perils of the wire), Dallas, Circuit Judge, Third Circuit, says; in the case of

Newark Electric Light & Pow. Co. v. Garden, 37 L. R. A. 729;

"There was no risk involved but that which the presence of the wire created, and that was, apparently, provided against by insulation. So far as appeared, therefore, the bar was not dangerous, and, in placing himself where and as he did, this man was doing his work, as one of the witnesses said: 'the same as any

man would do it that works at the business;' and common sense and humanity demanded, as we think, that while so working his life should not have been put in jeopardy, we do not say by a trap, for there was no purpose to ensnare, but by an unknown and invisible peril to which he might unconsciously or involuntarily be drawn, and from which, by taking ordinary care, the defendant might have protected him. The defendant cannot be heard to say that it did not anticipate that the linemen of the other companies, as well as its own, would do their work in the way that is usual with them. It was bound to know that they might come in contact with its wire; and that it did, in fact, assume the duty of providing against the occurrence of such casualties is shown by its having insulated the wire at all. The fact that it was insulated was calculated to induce reliance upon its safety, and plainly tended to allure or entice such a man as Mason to go upon the bar on which it was stretched. It offered an obvious, and seemingly, a protected standing place."

That the employer is bound to use reasonable care to protect the servant from unnecessary risk, and is liable for damages occasioned to him through some latent danger of which he should be warned, is a well settled principle of law.

Western Union Tel. Co. v. McMullen (N. J.), 32 L. R. A. 352; and note thereto.

We feel that it is unnecessary to answer opposing counsel further on this their first question raised, since their argument proceeds on facts not warranted by the

present case. However, in this connection we must not overlook opposing counsel's gross misinterpretation of the case of Consolidated Gas Co. v. Brooks (N. J.), 53 Atl. 296, supposed by them to be an authority for them on the present question, but we submit that it is against their contention, and aptly in our favor, and as proof thereof we hereby beg to be permitted to quote the opinion in full:

"Per Curiam. The plaintiff's decedent was a gardener in the employ of one Elias Asiel at Long Branch. While engaged in painting a gutter on the edge of one of the balconies on the house of his employer, the decedent came in contact with an electric wire which ran up the side of the house some eight or ten inches from the corner of this balcony, and received a shock which instantly killed him.

But two errors are assigned: First, the refusal of the court to grant the defendant's motion to non-suit the plaintiff; and second, the refusal of the court to grant the defendant's motion to direct a verdict in its favor.

Both of defendant's motion were rested on two grounds. First, that the case showed that the death of the plaintiff's decedent was partly due to his own negligence; and, second, that it failed to show that his death resulted from any neglect on the part of the defendant of any duty which it owed to him.

We find nothing in the case which would have justified the trial court in holding that the negligence of the deceased conclusively appeared. No one saw the acci-

dent, and there was no testimony to show how it occurred. The mere fact that while engaged in painting the gutter upon this balcony he came in contact with the electric wire of the defendant company is not, in itself, conclusive evidence of negligence on his part. Nor would the trial court have been justified in directing a verdict for the defendant upon the ground that there was no evidence from which a jury could conclude that it was neglectful of any duty which it owed the decedent; there was evidence from which such negligence could have been found.

Our conclusion is that both of the requests of the defendant were properly refused, and that the judgment below should be affirmed."

II.

The statement of the master's second contention is not substantiated by the Record. All of the testimony in the case applicable to the scene of Monahan's injury was given with reference to a model. The model was offered in evidence at the beginning of the trial (R. 43) and admitted later without objection. (R. 139) There is no question that the model did not faithfully represent the scene of the injury. It was used at all times by all counsel during the trial on the theory that it did. Each expert witness treated the model as portraying the same conditions manifested to him when he made an examination of the premises for the purpose of testifying in the case. It seems to us self-evident that, had a fire affected the premises to the extent

claimed in the interim between the injury and the examination thereof by the experts, the fact of changed conditions by the first must have cropped out during the trial. It did not. Therefore it must be rationally concluded that the witnesses did not base their testimony on conditions existing two years after the injury happened. The master's contention in this regard arises from the fact of confusion of dates by Monahan's witnesses. The Record shows at page 138 that Monahan took his experts down to the scene of the injury during November or December, 1905, while the fire did not occur until January 31, 1906. (R. 235) The case was tried on the theory that no changes had taken place on the roof of the building other than through the effects of the fire, and therefore we submit that opposing counsel disclose no error by this, their second contention.

III.

The master's third contention is based upon the permission given an expert to answer the following question:

"What was the best insulation known to protect human beings from a current in July, 1904, and in the vicinity of Butte?"

A. "The best insulated wire that was known at that time, and in fact at the present time, is rubber-covered wire."

After an examination of the authorities cited in this behalf by opposing counsel, we feel that opposing coun-

sel are for the time being overlooking the nature of this cause for action. Monahan was ordered into proximity with a deadly electric wire without warning. To him the place appointed for his common labor revealed no extraordinary danger. He was ignorant of the precautions necessary to protect himself. Therefore we must again repeat from the opinion of Judge Dallas:

"There was no risk involved but that which the presence of the wire created, and that was, apparently, provided against by insulation. So far as appeared, therefore, the bar was not dangerous, and, in placing himself where and as he did, this man was doing his work, as one of the witnesses said: 'The same as any man would do it that works at the business;' and common sense and humanity demanded, as we think, that while so working his life should not have been put in jeopardy, we do not say by a trap, for there was no purpose to ensnare, but by an unknown and invisible peril, to which he might unconsciously or involuntarily be drawn, and from which, by taking ordinary care, the defendant might have protected him."

The ordinary care necessary to have protected Monahan was to render the wire safe by rubber insulation, or to have raised the wire out of his ordinary reach, or, and at least, to have given him warning commensurate with the danger. Failing so to do, the master cannot be said in law to have exercised ordinary or any care for the safety of his servant, in view of the danger to which he was exposed. Considering the danger, the question as to what was the best insulation in use at the

time of the injury was proper as bearing on the point of what care the master had actually taken to make the wire harmless to touch. For in all occupations the degree of care required is measured by, proportionate and equal to, the danger of the situation. In this case the jury might well have found that the situation and force being conveyed was one of utmost danger, i. e. highest danger. If so, the utmost, highest, best care was needed to satisfy the law. For the highest degree of care under circumstances of highest degree of danger is nothing more than ordinary care. The highest, utmost, best care would be the use of the *best* insulation exposed to the touch of human beings. We find no authority at variance with these views, when treating upon subjects of great inherent danger. In McLaughlin v. Louisville Elec. Lt. Co. (Ky.), 34 L. R. A. 812, Guffy, J., says:

"The evidence in this case conduces to show that appellant was at work at his regular trade, and was where he had a right to be, and the joint of the wire, being apparently insulated, was to some extent, at least, a guaranty that there was no danger; but, independent of that fact, the situation of appellant, his work in hand, and the proximity of the wire, were such that he might without negligence have thoughtlessly taken hold of the wire, because he seemed to need support; and, besides, it was hardly to be expected that the current was on the wire at about noon, the wire being used wholly to supply incandescent lights or lamps. It seems clear to us that appellee should have been required to have had

perfect protection on its wires at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. Very great care might be sufficient as to the wires at points remote from public passways, buildings, or places where persons need not go for work or business; but the rule should be different as to points where people have the right to go for work, business, or pleasure. At the latter points or places, the insulation or protection should be made perfect, and the *utmost care* used to keep it so."

See also:

Bourke v. Butte Elec. & Pow. Co. supra;

Lexington R. Co. v. Fair's Admr. (Ky.), 71 S. W. 628;

Denver Con. Elec. Co. v. Simpson (Colo.), 31 L. R. A. 566;

Haynes v. Raleigh Gas Co. (N. C.), 26 L. R. A. 810;

Atlanta Con. St. Ry. Co. v. Owings, (Ga.), 33 L. R. A. 798;

Thompson's Commentaries on the Law of Negligence, Section 800.

IV.

The fourth contention of the master is that the safety or danger of the premises under consideration was not the subject of opinion evidence. We cannot concur. We admit that opinion evidence would not be necessary to aid a jury in determining whether an ordinary hoe,

having been fully described, could be wielded with deadly effect. So, with reference to a fence fully described to the jury, whether the same would turn cattle; and so, with reference to other simple things of which the ordinary juror has a fair idea at the outset. We submit, the juror would not need the opinion of experts to reach a rational conclusion as to the safety or danger of such simple things. But the present case is very different. It is true that electricity is becoming generally known as a dangerous commodity; and so with reference to strychnine, though known for hundreds of years, yet the ordinary juror does not know what amount of either will kill or harm a human being. It seems to us that electricity may well be classed with strychnine when the question is what amount of either is harmful. Whether the wire with voltage and amperage ascertained was safe or dangerous to the touch of a human being was the question sought to be answered by expert opinion below. No man, not even Edison, has mastered the subject of electricity in its entirety. What knowledge Edison possesses is but relative. Under some circumstances an electric wire is harmless, but at other times is deadly. To become fairly acquainted with the perils of electricity, when used in quantity, requires a scientific study, and is something the average man does not pick up in the ordinary course of life. Nor does he become sufficiently informed to speak advisably concerning the safety or danger of an electric wire when carrying a high current.

Had the negligence charged been merely that the master had ordered a common laborer to go upon the roof of a steep building to adjust certain timbers, and the servant exercising due care had fallen off to his injury, then the roof being fully described, expert opinion would be inadmissible for that the jury would be presumed to be able to deduce from its common knowledge of buildings a reasonable conclusion as to the safety or danger of the roof. Yet it is suggested that had the servant apparently slipped from a certain steep angle of the roof, expert opinion might be properly admitted on the point of how steep an angle the ordinary man may safely stand. But, to continue the illustration, had the servant encountered on the roof an unknown and invisible danger in the shape of a deadly electric wire to his great bodily harm, what court could say the jury had sufficiet common knowledge concerning electricity to conclude rationally what wires the servant might have safely touched, or otherwise, even after a most thorough description of the roof with its over-hanging wires.

We feel that opinion testimony was necessary in this case, and opposing counsel evidently felt likewise during the trial, for they made use of the same character of testimony. See Record, pages 236, 273, and 276.

We cannot find that this point has been directly decided in an electrical injury case, yet we do find the rule recognized in Excelsior Elec. Co. v. Sweet, (N. J.), 30 Atl. 553, in the following words:

"The witnesses were experts with respect to the sub-

ject matter on which they were examined, and the opinions of such witnesses are competent evidence whenever such testimony is reasonably necessary to give the court and jury a fair or intelligible understanding of the subject matter in controversy."

In this connection we call attention to the trial court's response to opposing counsel's objection to such character of testimony on page 17 of their brief. We also call the attention of this Court to its remarks in the case of Union Pacific Ry. Co. v. Novak, 61 Fed. 573, relative to the qualification and evidence of an expert.

The Supreme Court of the United States in the case of Spring Company v. Edgar, 99 U. S. 645, held that opinion evidence was proper relative to the safety or danger of a stag during the rutting season.

See also:

Thompson's Commentaries on the Law of Negligence, Sections 7751-2.

V.

Opposing counsel seem to think that the allegation of the complaint declaring that Monahan's life was shortened by virtue of the injury is self-evident reason why the expectancy of human life should not be considered in evidence. It is apparently overlooked that whether the injury complained of had such effect was a matter of legitimate inquiry for the jury The pleading of such fact is undeniably proper and, if proven, was an element of damage to be considered by the jury. Observation teaches us that every severe injury tends

to shorten life, hence, if expectancy of life to be ascertained through the use of mortality tables and the cost of an annuity may be properly introduced in evidence to aid the jury in arriving at the amount of damages to be allowed, we cannot see how the mere recital of the fact of shortened life changes the situation. The master's argument in this behalf seems to be: I have wrongfully shortened Monahan's life and by reason thereof I should in this case secure a reduction of damages. We cannot agree with the deduction sought to be drawn by opposing counsel on this point.

In the case of Grant v. Union Pac. Ry. Co., cited by the master, we note that Shiras, Judge, clearly recognizes Monahan's right to have the possible expectancy of his life considered by the jury when assessing damages, and we must assume that the trial judge properly instructed the jury in this regard in the absence of his charge from the Record.

With reference to the question of an annuity, we desire to call the Court's attention to the fact that this question is settled in Montana. We refer to the case of Bourke v. Butte Elec. & Pow. Co. supra. In delivering the opinion of the court in the above case Judge Holloway says:

"We think the rule announced by the Texas court, above, is the correct one, and in fact the only safe guide in fixing such damages. The question in a case of that kind, is: What amount will purchase an annuity equal to the difference between the annual wages or salary received by the plaintiff before and after the injury,

where the injury is the proximate cause of the impairment of earning capacity? This rule is approved in Baltimore & Ohio R. Co. v. Henthorne, 73 Fed. 634, 19 C. C. A. 623; 4 Sutherland on Damages, 3d ed. sec. 1249."

"The law does not contemplate that the injured party shall be paid in advance a sum, the interest from which will equal such amount and at his death leave the principal to his estate, but only that he shall not be made to lose because of his injury. From standard mortuary tables and tables made use of by actuaries to determine the cost of a particular annuity, such damages may be ascertained and fixed with some degree of certainty." (p. 289).

See also:

Lewis v. Northern Pac. Ry. Co. (Mont.), 92 Pac. 469.

It is true that evidence relating to annuities and expectancy of life may be a source for erroneous and prejudical instructions as appears from the master's brief, but it is not to be presumed that the trial judge in this case so warped the evidence complained of in his charge to the jury that the master was prejudiced thereby. The contrary not appearing, the correctness of the charge in this behalf will be presumed.

VI.

We submit that the master's sixth contention is without merit in the light of the authorities heretofore cited.

VII.

We now consider the contention that Monahan's action is barred by a retraxit. We quote the order relied upon:

"This cause came on regularly for hearing at this time upon motion of defendant Colusa Parrot Mining and Smelting Company to strike from the files the amended complaint; W. M. Bickford and George F. Shelton, Esq., appearing as counsel for said defendant, and H. L. Maury, Esq., as counsel for plaintiff, and thereupon upon motion of counsel for plaintiff it is

Ordered that this action be dismissed *without prejudice* as to said defendant Colusa Parrot Mining and Smelting Company, and without costs to either party.

In open court Feb. 14th, 1905." (R. 283).

We quote also the statutes of Montana bearing upon the subject, viz: Sections 1004, 1005, 1007, and 1008, Chapter I, Title VIII, Part II, of the Code of Civil Procedure, adopted 1895, relative to Trial and Judgment in Civil Actions:

SECTION 1004: An action may be dismissed or a judgment of non-suit entered in the following cases:

1. By the plaintiff himself, at any time before trial, upon payment of costs; *provided*, a counterclaim has not been made or affirmative relief sought by the answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2. By either party upon the written consent of the other.

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4. By the court, when upon the trial and before the submission of the case the plaintiff abandons it.

5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.

6. By the court, when after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months.

7. No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court, in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and served and return made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years.

The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register."

SECTION 1005: "In every case, other than those mentioned in the last Section, judgment must be rendered on the merits."

SECTION 1007: "A FINAL JUDGMENT DISMISSING THE COMPLAINT, EITHER BEFORE OR AFTER A TRIAL, DOES NOT PREVENT A NEW ACTION FOR THE SAME CAUSE OF ACTION, UNLESS IT EXPRESSLY DECLARES, OR IT APPEARS BY THE JUDGMENT ROLL, THAT IT IS RENDERED UPON ITS MERITS."

SECTION 1008: "Upon the dismissal or disposition of an action in which the court has jurisdiction of the subject matter of the action, it is the duty of the court to render such judgment for costs."

As justification for the trial court's ruling in the matter of retraxit, and as a complete answer to the authorities cited, and argument made in this behalf by opposing counsel, we direct the attention of this Court to the interpretation put upon the above Sections by the Supreme Court of Montana, in the following so-called "Glass" cases:

The case of Glass v. Basin & Bay State Mining Company, 85 Pac. 746 (1906), was an action for money had and received. Judgment was demanded for $140,000 and costs. The answer presented separate defenses. The sixth defense alleged in sustance that heretofore on August 21st, 1901, in an action then pending in the District Court of the Fifth Judicial District, of the State of Montana, between the plaintiff herein as plaintiff, and the defendant herein as defendant, being the same parties as are parties to this cause, and for the same cause of action, there was interposed by the defendant a motion for judgment on the plead-

ings, which, upon consideration by the court, was sustained, and a final judgment rendered and entered for defendant, dismissing the action. The reply thereto was one in avoidance and to the effect that the judgment rendered was not one upon the merits. Judgment went for the defendant on the pleadings, for the reason, among others, that there was no issue of fact to be tried on the sixth defense pleaded in the answer. On an appeal from the judgment rendered on the pleadings, the question was whether the right to maintain this action is barred by the judgment in the former action? The Supreme Court held that the action was not so barred, and disposed of the matter in the following language:

"Does it appear that the former judgment was upon the merits of the controversy? Section 1007 of the Code of Civil Procedure declares that "a final judgment dismissing the complaint, either before or after a trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon its merits." The appellants' position is that the judgment pleaded does not expressly declare that it was rendered on the merits; and since the judgment roll was not before the district court, it could not tell on the trial of the motion what its effect was. The argument of respondent is that Section 1004 of the Code of Civil Procedure enumerates the cases in which an action may be dismissed or judgment of non-suit entered; that Section 1005 declares that in all other cases than those

mentioned in Section 1004, the judgment must be rendered on the merits; and that, since the judgment in controversy does not fall within the cases enumerated in Section 1004, the presumption must be indulged that it was rendered on the merits. Hence it is said that the judgment of the District Court, since it is aided by this presumption, must be deemed correct. In this contention we think respondent is in error. The rule contended for by respondent is recognized by the Supreme Court of the United States in United States v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601. In that case the court had under consideration the statutes of Nevada, which are nearly identical with Sections 1004 and 1005, supra; but that decision has no application to this case, for the reason that the Code of Nevada contains no such provision as Section 1007. Furthermore, this court in Kleinschmidt v. Binzel, 14 Mont. 31, 35 Pac. 460, 43 Am. St. Rep. 604, held under an identical statute (Comp. St. 1887, Div. 1, 243) that a judgment rendered on demurrer did not estop the plaintiff in the action from asserting his claim in a subsequent action; nothing appearing upon the face of the pleadings to show that the judgment went to the merits, rather than to some defect of form. A judgment on the pleadings is the same as a judgment on demurrer. Power et al v. Gum, 6 Mont. 5, 9 Pac. 575. Judgments on demurrer or on the pleadings which result in the dismissal of the action are not enumerated in Section 1004. As will be seen by an examination of the case of Kleinschmidt v. Binzel, supra, and the authorities cited,

it was a matter of dispute when that decision was made, as to what presumption should attach to them when pleaded in bar. That case declared the rule which controlled in this state until the adoption of the Code in 1895, which, besides bringing forward in Sections 1004 and 1005 the provisions of the Compiled Statutes, supra, added Section 1007. This provision, construed with the others, means nothing more nor less than that judgments of dismissal, whether included in the enumeration in 1004 or not, shall not be a bar to another action upon the same cause of action, unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment roll. In other words, such a judgment must show of itself, or by aid of the judgment roll, that it concludes the merits of the controversy, or it is no defense. The judgment relied on here shows upon its face that it belongs to the class referred to in Section 1007. It does not declare that it adjudicates the merits, and, since the judgment roll was not before the District Court, no presumption can be indulged that it was rendered on the merits. In so far, therefore, as the action of the District Court was based upon such presumption, it was erroneous."

After the above reversal, the defendant thereupon amended its answer, making the judgment roll in the first case a part of its answer in the second one; and, a reply thereto being filed by the plaintiff, the defendant again moved for judgment on the pleadings, which was sustained, and a judgment entered, from which judg-

ment the plaintiff again appealed. The Supreme Court again reversed the judgment on the same point, see 90 Pac. 753 (1907), and in so doing say, in part:

"In the former opinion (34 Mont., at page 95, 85 Pac. at page 747) this court further said: "This provision (Section 1007, Code Civ. Proc.) construed with the others, means nothing more nor less than that judgments of dismissal, whether included in the enumeration in 1004 or not, shall not be a bar to another action upon the same cause of action, unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment roll." Glass et al v. Basin & Bay State Min. Co., 34 Mont., at page 95, 85 Pac. at page 747. And this is also the law of this case, and we think, clearly correct. The Legislature certainly did not intend to set the matter at rest altogether in the one instance by requiring an express declaration of the fact that the judgment was upon the merits, when the judgment alone is offered as proof, and in the other leave it open for the many different conclusions which might be drawn from the same records by different courts. Obviously, what the Legislature meant was that, if recourse is had to the judgment alone, the judgment must contain an express declaration of the fact that it was rendered upon the merits; and if the judgment is silent, then, if it appears by express declaration of the fact in the judgment roll elsewhere than in the judgment, it will be sufficient to constitute the judgment a bar to another action for the same cause of action. This seems to be the

holding of the Court of Appeals of New York upon a statute similar to our Section 1007 above (Genet v. Delaware & Hudson Canal Co., 170 N. Y. 278, 63 N. E. 350), and we have not been able to ascertain that any states other than New York and Montana have this statute, so that decisions from other states are of little assistance upon this phase of the case.

In order, then, to successfully maintain that a judgment of the class mentioned in Section 1007, above, is a bar to another action for the same cause of action (1) such judgment must be upon the merits and (2) the fact that it is upon the merits must appear by express declaration either from the judgment or elsewhere from the judgment roll. As it does not appear, either from the judgment or elsewhere from the judgment roll of the first case, that both of these conditions are met, the District Court erred in sustaining the motion for judgment on the pleadings."

The above order confessedly does not import a judgment on the merits. It will be observed that the order contains the phrase "without prejudice." As to the accepted meaning of the phrase, we cite the following:

"The words 'without waiver or prejudice' have in the legal profession and among business men a well understood value. They import into any writing in which they appear that the parties have agreed that, as between themselves, the receipt of the money by one, and its enjoyment by the other, shall not, because of the facts of the receipt, and payment, have any legal effect upon the rights of the parties in the premises;

that such rights will be as open to settlement by negotiation or legal controversy as if the money had not been turned over by the one to the other." Genet v. President, etc., of Delaware & H. Canal Co., 63 N. E. 350, 352, 170 N. Y. 278.

Where, upon appeal, it was discovered that the statement prepared was not settled by the judge below as required, and appellant moved for leave to withdraw it for the purpose of correcting the omission, and in conformity with the application, an order was made dismissing the appeal "without prejudice," in view of such phrase, a contention that the dismissal operated as an affirmance of the judgment, was error. Cooper v. Pacific Mut. Life Ins. Co., 7 Nev. 116, 119, 8 Am. Rep. 705.

The purpose and effect of the words "without prejudice," in a decree dismissing a bill without prejudice, is to prevent the defendant from availing himself of the defense of res judicata in any subsequent proceeding by the same plaintiff on the same subject matter. This is the doctrine of Story, Eq. Pl. Sec. 793 of 1 Daniell, Ch. Prac. 659, and of Beach, Eq. Prac. Sections 643, 644. O'Keefe v. Irvington Real Estate Co. 39 Atl. 428, 87 Md. 196; Taylor v. Slater, 41 Atl. 1001, 1003, 21 R. I. 104.

The entry, "dismissed without prejudice" in an action of divorce brought by a husband on the ground of adultery, indicates that the libel was not dismissed upon the merits of the case. Ray v. Adden, 50 N. H. 82, 84, 9 Am. Rep. 175.

The words "without prejudice," contained in a decree dismissing a bill, indicate a right or privilege to take further legal proceedings on the same subject, and show that the dismissal is not intended to be res judicata of the merits. Seamster v. Blackstock, 2 S. E. 36, 38, 83 Va. 232, 5 Am. St. Rep. 262.

A dismissal without prejudice leaves the parties as if no action had been instituted. It gives to a complainant the right to state a new and proper cause, if he can; but it takes away no right of defenseto such suit on any ground other than that of the judgment as a bar. Taylor v. Slater (R. I.), 41 Atl. 1001, 1003.

The term "without prejudice" in a leave to withdraw an appearance in the case without prejudice, means that the position of the withdrawing party is not to be unfavorably affected by the act of withdrawal. Creighton v. Kerr, 87 U. S. (20 Wall), 8, 12.

See also:

Wallace v. Lewis (Mont.), 24 Pac. 22;
Newberry v. Ruffin (Va.), 45 S. E. 733;
Cochran v. Couper, 2 Del. Ch., 27, 31;
Heirs v. Waring (Ala.), 60 Am. Dec. 533;
Yakel v. Yakel (Md.), 53 Atl. 914, 916;
Bates v. Skidmore (Ill.), 48 N. E. 962, 963;
Dixon v. Higgins (Ala.), 2 South. 289, 291.

We submit:

"By Rev. Stat. Section 914, the practice, forms, and mode of proceedings in actions at law in the Federal courts are required to conform as nearly as may be to those in the state courts."

Lowndes v. Huntington, 153 U. S. 18.

In the light of the foregoing, the authorities cited by the opposing counsel, are clearly not in point and their argument is therefore without merit.

WHEREFORE, we urge, that the Monahan judgment be affirmed.

Respectfully submitted,

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